

ORIGINAL  
MAY 29 1985

Before the  
COPYRIGHT ROYALTY TRIBUNAL  
Washington, D.C. 20036

1983 CABLE ROYALTY ) Docket No. CRT 84-1-83CD  
DISTRIBUTION PROCEEDING )

PROGRAM SUPPLIERS' OBJECTIONS  
AND MOTION TO STRIKE

The Motion Picture Association of America, Inc., its member companies, and other producers and syndicators of syndicated series and movies broadcast by television stations (Program Suppliers), in accordance with the procedures adopted by the Tribunal (50 F.R. 13845), hereby file their objections to the direct evidence of other claimant categories.<sup>1/</sup> No objections are submitted to the direct testimony and exhibits of the Joint Sports Claimants, Music Claimants, Canadian Claimants, and National Public Radio.

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<sup>1/</sup> At the informal conferences concerning document requests and objections, it was agreed that parties would have until June 3 to submit requested underlying documents. The parties agreed that objections on grounds of failure to provide underlying documentation could be made after June 3, if the requested documents were not provided at that time. In those instances where a party has already indicated underlying documents will not be made available, objection is made in this paper.

OBJECTIONS

National Association of Broadcasters

I. Testimony of John D. Abel

- A. Witness lacks qualification to testify (competency) concerning legal conclusions. Dr. Abel's qualifications (Abel, Ex. 2) indicate that he has not studied law nor has he been qualified to practice law. Accordingly, Dr. Abel is not qualified to make legal conclusions addressing matters at issue in this proceeding.

Objection is made to the following portions of Dr. Abel's testimony on this ground:

- (1) page 5, ¶3, second sentence. This sentence makes legal conclusions that "broadcast stations were the copyright owners" and are "entitled to [syndex] royalties" as to which the witness is not qualified to testify.
  - (2) page 14, last paragraph, "The relevant copyright owners for this purpose are broadcast stations, and they are entitled to virtually all of the syndex fund." This sentence assumes certain legal conclusions as to which the witness is not qualified to testify.
  - (3) page 34, first paragraph, third sentence. This concludes again that "broadcast stations were the copyright owners."
- B. Witness not competent to characterize prior decisions and awards. Dr. Abel characterizes the Tribunal's past conclusions regarding NAB's awards and portions of different parties' testimony. While no objection is made to the mere recitation of factual information, Dr. Abel embellishes the discussion with particular characterizations. Dr. Abel does not have first-hand knowledge of how the Tribunal's past decisions were reached, and therefore he is incompetent to discuss the weight assigned to various pieces of evidence in past proceedings. Furthermore, these past decisions as written are the best evidence of their meaning and precedential value, and cannot be revised or embellished by "testimony" in subsequent proceedings.

Objection is made to the following portions of Dr. Abel's testimony on this ground:

- (1) pages 9-12, section entitled "The Old Tribunal's Awards to NAB." This entire section is replete with characterizations of what and how different portions of evidence were treated by the "old" Tribunal (as if the Tribunal were not an institutional body). As just one example, Dr. Abel states on pages 11-12, "NAB believes this was the result of the Tribunal's following the basic structure of the allocations it adopted in the very first distribution proceeding, 1978." This statement is pure speculation as to the decision-making process. Dr. Abel goes on (page 12) to make additional conjectures as to what would have happened in other circumstances.
- (2) page 23, first full sentence beginning "Those awards ...". Dr. Abel has mischaracterized the bases upon which prior decisions were made. The Tribunal's decisions have been upheld in spite of challenges that there was not "direct, reliable and valid evidence" regarding NAB's awards. The court's decisions highlight Dr. Abel's incompetency to characterize the validity of the Tribunal's decision-making as well as the impropriety of subsequent attacks to final decisions.
- (3) page 32, second paragraph, sentence beginning "Direct quantification evidence ...". The Tribunal did not accept the validity of the evidence cited from the 1980 proceeding concerning NAB's compilation claim. Nothing was awarded to NAB for compilation because "compilation is of no value to a cable system." 1980 Cable Royalty Determination, 48 F.R. 9552, 9566 (1983). Dr. Abel's characterization that NAB's 1980 evidence provides a direct quantification of an allocation is not based upon first-hand knowledge of the Tribunal's assessment of the 1980 evidence on this point and improperly attempts to revise that record.

C. Underlying Documentation Not Provided. Dr. Abel makes factual assertions for which no underlying documentation will be provided by NAB. Absent the supporting data, it is impossible to verify the accuracy of these statements.

Objection is made to the following portions of Dr. Abel's testimony on this ground:

- (1) page 17, first full paragraph through next paragraph ending on top of page 18. Reference is made to a "trend throughout 1983" toward more station-produced programs. No documentation is provided for this conclusion nor is any indication given as to how the trend was measured in comparison to past years. This general statement is followed by specific examples of increased superstation news broadcast without any background for these assertions.
- (2) pages 30 and 31. Reference is made to a "subscriber survey prepared for presentation at the National Cable Television Association's annual convention in 1984" (p. 30) and to "research [which] suggests that television program choices are in part a function of broadcast scheduling rather than program content" (p. 31). Dr. Abel's points cannot be tested unless access is provided to the underlying studies on which he relies for his contentions.

## II. Testimony of Arthur R. Miller

Witness lacks first-hand knowledge. Mr. Miller relies upon an analysis in which it is assumed the licensing agreements between syndicators and broadcast stations make no provision for entitlement to syndicated exclusivity royalties or that the contractual language gives the station all such rights. No contracts are offered to warrant these assumptions nor does the testimony reflect the fact that Mr. Miller has reviewed any such contracts, let alone that he has reviewed a sufficient number of these contracts so that he can speak from personal knowledge of their collective meaning and import. Absent such first-hand knowledge, Mr. Miller is not qualified to testify on this point.

Objection is made to the following portion of Mr. Miller's testimony on this ground:

page 7, first full paragraph through the end of page 8. This portion purports to construct the reasoning necessary to show why stations should receive the royalties based upon an analysis that "the station becomes the copyright owner of the exclusive performance rights throughout the geographic area of exclusivity described in the licensing agreement."

(p. 7.) Mr. Miller does not describe language from any licensing agreement, does not offer any examples of the language, nor does he indicate he has ever seen such an agreement. Absent this supporting material, his premise has not been established nor has his qualifications to testify about licensing agreements on this point.

### III. Testimony of Harold E. Protter

- A. Irrelevant testimony. Mr. Protter describes various "examples of how syndicators have used their bargaining muscle to drive up prices on syndicated product." (page 8.) These examples have nothing to do with the issues in this proceeding. The examples provided address negotiating positions between the station and the syndicator; these are wholly unrelated to the distant non-network programming issues facing the Tribunal here.

Mr. Protter's attempt to link these examples to the issues by indicating they address "who was hurt when the syndicated exclusivity rules were eliminated" (page 7) ignores the fact that this issue has long since been resolved. The FCC originally found that the stations were not hurt nor would be by elimination of the rules. The Tribunal was asked to accept this ruling by NCTA when it set rates for loss of syndicated exclusivity. Solely on the basis of Program Suppliers' evidence, the Tribunal found that the syndicators were harmed by the loss of the protection. Adjustment of the Royalty Rate for Cable Systems, 47 F.R. 52146, 52158 (1982). Thus the ostensible reason for the testimony is not at issue here, but one which has already been decided by the Tribunal.

Objection is made to the following portions of Mr. Protter's testimony on this ground:

page 7, first full paragraph through page 14, first full paragraph. This section describes several aspects of the syndicator-station negotiation process.

- B. Failure to Provide Underlying Documents. NAB has indicated that it will not provide copies of the licensing agreements to which Mr. Protter refers. For example, Mr. Protter refers to "language in their licensing agreements" (pages 4 and 5) and "typical syndicated series or feature film package licensing agreement" (pages 5 and 6). No direct language from any agreement is quoted and no underlying contracts have been provided. The testimony is nothing

more than an unsubstantiated characterization of what a portion of a so-called typical contract purports to say.

The Tribunal in the 1980 proceeding struck from the record actual contractual provisions from licensing agreements which were offered along with the testimony of an attorney for Warner Bros. as to their meaning. Based upon the precedent of that ruling involving actual contracts,<sup>2/</sup> it is clear that testimony describing what agreements allegedly say -- rather than the actual agreements -- must be stricken. Given the number of syndicators and the variety of licensing agreements, it is impossible for the Tribunal to rely upon recollection as to what was "typically" stated.

Objection is made to the following portions of Mr. Protter's testimony on this ground:

page 4, last sentence through end of sentence on page 5; page 5, paragraph beginning "The typical syndicated series ..." through page 7, first two lines. This portion of testimony refers to "typical" provisions regarding years and runs and then switches over to purporting to describe what stations buy, "when we buy exclusive exhibition rights to their programs" (page 6). No underlying documentation is provided for any of this testimony.

- C. Hearsay and Unsubstantiated Statements. Mr. Protter attempts to prove that certain assertions are true based upon statements he has heard from other persons. He makes additional statements in support of his assertions which are not substantiated in the record. None of these are admissible because it is impossible to test the validity of the assertions based upon Mr. Protter's testimony.

Objection is made to the following portions of Mr. Protter's testimony on this ground:

- (1) page 9, sentence beginning "The reason the syndicators insist on this, I suppose ... ." The statement is obviously speculation about which Mr. Protter has no first-hand knowledge.
- (2) page 10, paragraph beginning, "One of the reasons why ... ." Mr. Protter may have first-hand knowledge about his purchases from a syndicator,

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<sup>2/</sup> For the convenience of the Tribunal, the relevant pages from the 1980 proceeding transcript are attached.

but he is speculating as to reasons why a syndicator might sell some product as part of a package.

- (3) page 12, paragraph 4. No substantiation or method of comparing prices is provided for the first two sentences. The third sentence is hearsay offered to prove the truth of the first two sentences. The final sentence is pure speculation. There is absolutely no way to test the accuracy of any contention in this paragraph.
- (4) page 12, last two full sentences, beginning "But it is..." and ending "... or even in bankruptcy." No substantiation for either sentence or for the implicit connection that the prices for programs have led some independents to bankruptcy. These statements are contrary to the generally perceived view that independents are enjoying unprecedented growth and profitability, largely on the strength of their syndicated programs profits.
- (5) page 14, second full paragraph beginning "A syndicator salesman ... ." Hearsay and speculation as to what a "syndicator salesman" might say.
- (6) page 16, last sentence, "Two years ago (in 1983), Ted Turner told me ..." through end of same paragraph on page 17. Hearsay. This clearly refers to a statement made by a declarant not available for cross examination and is offered to prove the truth of the assertion that syndicators were selling for lower prices to WTBS because of higher royalties. This hearsay is especially troublesome in light of Turner Broadcasting's request for a special rate for distant carriage of WTBS. Should the Tribunal reach the merits of the Turner Broadcasting petition, its decision must be based on evidence presented in that case, not by accepting hearsay offered in an entirely different matter.
- (7) page 17, first and second full paragraphs, beginning "I do not know how ... ." The witness acknowledges he does not know how funds are distributed, but nevertheless speculates as to how it is done. The next paragraph is nothing more than a summary of all the hearsay, unsubstantiated claims, and speculation of the

prior testimony threaded into a conclusion. The conclusion that "the syndex surcharge royalties [were] created to compensate for loss of stations' rights" is also one the witness is not qualified to make because it is a legal conclusion and this witness is not a lawyer, and because it characterizes a past Tribunal opinion, rather than letting that opinion speak for itself.

### Devotional Claimants

#### I. Testimony of David W. Clark

- A. Fee Generated Approach Rejected By The Tribunal As Basis For An Award. Dr. Clark seeks to have the Tribunal reinstate the time plus fee generated formula rejected in the 1978 and 1979 proceedings. Dr. Clark asserts "the fee generation methodology...is the most reliable and most equitable means to employ." (page 24.) The time plus fee generated approach was emphatically rejected as "not a clear or true reflection of the direct marketplace value of the work." 1978 Cable Royalty Determination, 45 F.R. 63026, 63036 (1980). This rejection was reiterated in the 1979 case and in the 1980 case to lesser degree. Equally telling, the Tribunal has consistently rejected any single formula as providing the answer to distribution. This judgment has been reaffirmed by the various pieces of evidence introduced showing that other factors can assist in the distribution process; these factors range from the Nielsen viewing data to surveys to cable operator testimony. All these things cannot be subsumed in a single formula approach.

Past rejection of the time plus fee generated and the well-established guidelines for making awards support a prompt summary rejection of this formula as the answer to the distribution decision-making. The Tribunal need not hear further evidence on this point. Indeed, Dr. Clark offers no new evidence to justify reconsideration of the rejected formula.

Objection is made to the following portions of Dr. Clark's evidence on this ground: pages 21-26 of the testimony and exhibits 12 and 13, all of which deal with the time plus fee generated formula.

- B. Irrelevant testimony. Dr. Clark refers, at pages 6-7, to a sale of one devotional program to BBC. This fact is irrelevant to this proceeding because it has not been established that the market for television programs in Great Britain in any way resembles the distant signal, non-network



programming market in the United States which is at issue in this proceeding. Exhibit 10 refers to local carriage of stations, a point that is also irrelevant in this case.

Objection is made to the following portions of Dr. Clark's testimony and exhibits on this ground: page 6, last paragraph through page 7, end of the paragraph.

Devotional Exhibit 10, all references to "L" (local) carriage. Local carriage of stations is not part of the matter before the Tribunal, yet this exhibit contains numerous references to local carriage. For example, KHJ has 62 local systems and only 21 distant, full-time systems, KICU had 46 local and 14 distant; KRON has 51 local and 11 distant, etc.

U.S. News and World Report Article. This article offers a list of the most influential persons in the United States. It has no relevance to the matters at issue here. In any event, Program Suppliers note that President Reagan, who heads the list, has starred in several syndicated movies and series.

- C. No Substantiation Provided. Dr. Clark makes several assertions for which no substantiation is provided. The lack of a foundation for introducing this evidence precludes its admission.

Objection is made to the following portions of Dr. Clark's testimony on this ground:

- (1) page 3, reference to "large core constituency". Past evidence, including that of Devotional Claimants, has shown that, at most, the programs appeals to a small core. No evidence is provided to change this earlier assessment.
- (2) page 8, first sentence. The Devotional Claimants have never demonstrated that they are harmed by distant carriage. At best, the Tribunal has given lesser or no weight to past showings that Devotional Claimants have "negative harm" (i.e., benefit) from distant carriage. No reference is provided as support for this assertion of demonstrated harm.
- (3) page 9, first sentence under heading "Benefits." Devotional Claimants have failed to demonstrate "clear benefit" from cable retransmission in past proceedings.

- (4) page 10, sentence "A substantial portion of the American public does not have access to local independent signals, and the devotional programming they carry, however." No support is given for either part of this statement. In fact, Devotional Claimants Exhibit 15 purports to show that Oral Roberts reaches 99% of U.S., Old Time Gospel Hour reaches 93%, and so forth.
- (5) page 18, sentence "All parties have had difficulty in presenting direct proof of entitlement under these subjective criteria in past proceedings." This is simply not the case; the parties have numerous exhibits and studies designed to meet directly the established criteris.

## II. Testimony of Victor C. Bosiger

- A. Irrelevant Testimony. Mr. Bosiger refers to CBN Satellite service, a 24-hour direct satellite service. The royalty fees paid by cable systems under Section 111 are not compensation for such non-broadcast satellite services. In fact, CBN provides this service free of charge to any cable system will to take it. The satellite service thus has no relevance to the issues involving distant carriage of non-network broadcast programming that are the subject of this proceeding.

Objection is made to the following portions of Mr. Bosiger's testimony on this ground:

- (1) page 9, first full paragraph, referring to CBN's "satellite signal" Mr. Bosiger asserts that subscribers "do not differentiate" between CBN Satellite, a separate 24-hour channel, and individual CBN programs which are broadcast by distant stations infrequently throughout the day or week. No basis is offered for this assertion.
- (2) page 12, paragraph under "Marketplace Value". Reference is made to the alleged marketplace value of CBN Satellite service -- as is made clear by the fact that Mr. Bosiger indicates "religious programming is bringing in revenue" -- which is irrelevant to the marketplace value of the distant broadcast programming. More important, Mr. Bosiger admits CBN Satellite has no marketplace value because cable operators do not have to pay to obtain it.

- B., Lack Of Substantiation. Mr. Bosiger refers to a "pre-operational survey" in which "numerous requests for religious programs" were made (page 8). The survey was not offered into evidence, leaving the parties unable to challenge its conclusions or its methodology.

Public Broadcasting Service

I. Testimony of Stephen R. Vedro

- A. Irrelevant Testimony. Mr. Vedro refers to a survey conducted and the consequent development of local, cable originated channels providing educational access. (page 2.) Local, cable originated channels are not the subject of this proceeding, nor are they reasonably related to distant broadcast signals. Moreover, the franchise agreements of many, many cable systems require the systems to provide local access channels for educational and other public use. Such franchise requirements are not necessarily a reflection of subscriber interest in public television.

Objection is made to the following portion of Mr. Vedro's Testimony on this ground: page 2, last paragraph through page 3 end of page.

Program Suppliers join in the objection of Joint Sports Claimants to PTV Exhibit 30 regarding PBS's failure to provide information as to which cable systems respondents carried a PBS station as a local signal, rather than as a distant signal. Knowledge of such information, which we do not believe would breach any confidentiality, is necessary for determining the validity of the purported value given to carriage of PBS stations. Program Suppliers object to this exhibit also on grounds of relevance since, other than question 10, the survey refers to 1985 information, not 1983 information.

Program Suppliers object also on relevancy grounds to PTV Exhibit 26, Appendix B and PTV Exhibit 33. Neither exhibit is

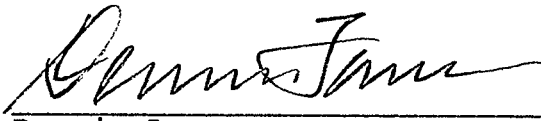
based upon 1983 information, and PTV Exhibit 33 is information concerning a Form 1 system.

MOTION TO STRIKE

Program Suppliers move the Tribunal to strike the portions of the testimony and exhibits to which objections are sustained. Striking the objectionable portions at this time will allow a "clean" record to be developed with all inadmissible evidence physically excluded.

Respectfully submitted,

  
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May 29, 1985

ATTACHMENT

1 please?

2 (Whereupon, the Reporter read the question, as  
3 requested.)

4 BY MR. SCHEINER:

5 Q Would you answer that, please?

6 A Mr. Scheiner, I believe you are asking me a dis-  
7 cussion of our entire claim, and a discussion of a legal  
8 issue that I don't particularly feel comfortable answering  
9 through lack of knowledge. I have not read the case. I  
10 am not an expert, necessarily, on compilation and copyright  
11 law but, certainly, on the exhibits that I have sponsored,  
12 and I would defer to counsel.

13 Q If you can't answer the question, that's fine.  
14 Off the record for a moment.

15 (Discussion off the record.)

16 MR. SCHEINER: I have given the Reporter, the  
17 Tribunal and other parties a document which I have identi-  
18 fied as MPAA Exhibit P, and it bears the caption Provisions  
19 of Representative Agreements of Program Suppliers Licensing  
20 Movies and Series Programs for Television Broadcasting.

21 (Whereupon, the document was  
22 marked MPAA Exhibit P for  
identification.)

23 I would like to note one correction to this  
24 exhibit. On the cover page, between Alan Enterprises, Inc.  
25 and Chamber of Commerce of the United States, please insert

1 CB Distribution Code. We simply failed to include that  
2 in our listing.

3 BY MR. SCHEINER:

4 Q Take a look, if you will, to the first television  
5 license agreement in this exhibit, and note, on the first  
6 page, paragraph 10, Reservation of Rights. "Licensor  
7 reserves" -- can you all read it? If so, then I don't  
8 have to read it.

9 .COMMISSIONER BURG: You may not have to read it,  
10 Mr. Scheiner, but I certainly hope you will explain it.

11 MR. SCHEINER: Commissioner Burg, what this says  
12 is, a rough translation, the sense of it is that the  
13 licensee is granted the right for the exhibition of this  
14 particular program, for the sole limited purpose of exhibit-  
15 ing it on his television station, and all other rights  
16 are reserved to the copyright owner.

17 BY MR. SCHEINER:

18 Q Does that language suggest to you a conveyance  
19 of rights for any purposes other than those that I have  
20 described?

21 CHAIRMAN BRENNAN: Mr. Ferrall?

22 MR. FERRALL: First, a clarification. Is the  
23 question, does the language Mr. Scheiner stated or the  
24 language in this paragraph suggest --

25 MR. SCHEINER: The language in the paragraph.

67 1 MR. FERRALL: I have two objections, Mr. Chairman.

2 First, these are blanks, printed blanks. These aren't  
3 agreements, they are forms. I live in a world of forms.  
4 That's what you go through and scratch things out of. If we  
5 have printed agreements that were actually completed, then  
6 I guess we can answer questions.

7 Second, I object on the grounds that the witness  
8 is not offered as an expert lawyer. He does have a law  
9 degree. And, third, if we are going to ask him a question  
10 about a paragraph in a technical legal document, I think  
11 that paragraph should be read to him and not characterized.

12 CHAIRMAN BRENNAN: The Chair will sustain objec-  
13 tions which go to the knowledge and ability of the witness  
14 to interpret contracts or the language of the Copyright  
15 Act.

16 MR. SCHEINER: Sir, I, obviously, will comply  
17 with the ruling, but let me try one further agreement so  
18 that I may understand the sense of the ruling.

19 CHAIRMAN BRENNAN: If you can put this in a  
20 factual context, perhaps you will be successful.

21 BY MR. SCHEINER:

22 Q Take a look, please, at the agreement, the  
23 second agreement, CB Distribution Company, and I want you  
24 to note particularly the language in paragraph 1, which is  
25 on the second page. And because the print is so poor, let

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1 me read it.

2 "This license does not grant any right to the  
3 licensee to transmit or to authorize others to transmit  
4 telecasts of the programs, by means of wire, cable, boosters,  
5 transistors, or community antenna systems, or by any means,  
6 whether now known or hereafter to be developed, other than  
7 by means of free home television for non-paying audiences."

8 Under the terms of this agreement -- this is a  
9 hypothetical -- a program is licensed to a television  
10 broadcast station, and a claim is made by that television  
11 broadcast station for compilation.

12 Does it not appear that the language which I  
13 have read to you, accidentally bars any such claim by the  
14 television broadcast station --

15 CHAIRMAN BRENNAN: Mr. Ferrall?

16 MR. FERRALL: I renew my objection, Your Honor,  
17 and I really have no objection to Mr. Scheiner making these  
18 kinds of arguments as a legal matter, and I will see if  
19 I can't find some forms in my file that have had these  
20 paragraphs crossed out, but I do object to asking a non-  
21 legal witness --

22 CHAIRMAN BRENNAN: For the reasons previously  
23 stated, the objection is sustained.

24 BY MR. SCHEINER:

25 Q I would like you to assume that in order to

1 (Discussion off the record.)

2 CHAIRMAN BRENNAN: Back on the record.

3 We will interrupt Mr. Cooper's examination at this  
4 point.

5 (Whereupon, the witness stood down.)

6 CHAIRMAN BRENNAN: Our next witness is Mr. Bernard  
7 Sorkin. Would you please come forward, sir?

8 Whereupon,

9 BERNARD SORKIN

10 was called as a witness and, having first been duly affirmed,  
11 was examined and testified as follows:

12 REBUTTAL DIRECT

13 BY MR. SCHEINER:

14 Q Sir, would you state your full name for the  
15 record, please?

16 A Bernard Sorkin, S-o-r-k-i-n.

17 Q And would you tell us please of your place of  
18 employment?

19 A I am employed by Warner Communications, Inc., in  
20 New York City, and its Legal Department.

21 Q And you are an attorney?

22 A Yes.

23 Q And how long have you been with Warner?

24 A I was first employed by Warner Brothers, a sub-  
25 sidiary corporation, in 1964, and I joined the parent

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1 company in 1969.

2 Q Will you tell us briefly of the nature of your  
3 assignments and responsibilities?

4 A They are broad-ranging, they are to provide legal  
5 advice on a variety of matters to the corporation and its  
6 divisions and subsidiaries.

7 Q Sir, I refer you to a document entitled "Warner  
8 Brothers Television Distribution, Inc.", which was contained  
9 in an exhibit MPAA P. I ask you to refer to that document,  
10 sir, have you examined it?

11 CHAIRMAN BRENNAN: Mr. Ferrall?

12 MR. FERRALL: Well, I think he should finish the  
13 question.

14 CHAIRMAN BRENNAN: I thought he had.

15 BY MR. SCHEINER:

16 Q Have you examined that document?

17 MR. FERRALL: I object, Mr. Chairman, this exhibit  
18 has been stricken from the record.

19 CHAIRMAN BRENNAN: Mr. Scheiner.

20 MR. SCHEINER: Sir, Mr. Ferrall is entirely correct,  
21 the exhibit was stricken. I put the question to the  
22 Tribunal, as to the bases upon which the Tribunal relied  
23 in striking Exhibit P. And was advised, generally, that  
24 the Chairman was not in the position to tell me that the  
25 bases relied upon by individual Commissioners, but that

1 in different circumstances the answer might be different,  
2 or that the Tribunal would consider it. That was the sense  
3 of it.

4 CHAIRMAN BRENNAN: You have correctly stated the  
5 Chair's response.

6 Do you wish to be heard further, Mr. Ferrall?

7 MR. FERRALL: On what subject, Mr. Chairman?

8 CHAIRMAN BRENNAN: On the pending objection.

9 MR. FERRALL: On the objection to --

10 CHAIRMAN BRENNAN: On your pending objection to  
11 this question.

12 MR. FERRALL: Well, Mr. Chairman, I don't quite  
13 understand, is the exhibit stricken, or isn't it?

14 CHAIRMAN BRENNAN: The exhibit as previously pre-  
15 sented was stricken. I assume at this point Mr. Scheiner  
16 is laying the foundation to possibly making another offer  
17 of this document, is that correct?

18 MR. SCHEINER: That is correct, sir.

19 MR. FERRALL: To reoffer the stricken document?

20 MR. SCHEINER: Precisely correct.

21 MR. FERRALL: Mr. Chairman, I am unfamiliar with  
22 this aspect of the rules of the Tribunal, is that part of  
23 the practice of this body, to reargue stricken exhibits?

24 CHAIRMAN BRENNAN: The Chair is the servant of the  
25 Commissioners. If you have no further argument on your

1 objection, I will poll the Commissioners.

2 MR. FERRALL: Well, in that case I will argue,  
3 although I am glad I brought my notes.

4 Mr. Chairman, I have not made a complete catalogue  
5 of the flaws in Exhibit P, but I did some weeks ago list  
6 a dozen of them, and I will read them off to you briefly.  
7 There are no dates on it, on any of the materials in it;  
8 there is no indication that the contracts were used in  
9 1980; very importantly, the exhibit is made up of "cut  
10 and paste" selections from agreements, not whole agreements;  
11 there is no signed agreement; there is no actual agreement  
12 in here, these are printed forms that may or may not be  
13 used.

14 And you may recall, that we had a witness here  
15 who said that they followed a general practice at their  
16 stations of not using these printed forms. There is no  
17 indication of how many different forms each of these  
18 companies actually has available, how were these forms  
19 selected, whether they are one of many, or the only one.  
20 Many of them are illegible; there is no evidence as to  
21 what clauses were stricken from these agreements when some-  
22 body signs them, we have all signed agreements, bought  
23 houses and so forth, that you cross stuff out, you put  
24 stuff in.

25 There is no evidence here because these aren't

1 agreements, these are printed forms.

2 There is no evidence as to what clauses were added  
3 to these agreements when they were signed by somebody.  
4 There is no sponsor for this exhibit who can explain what  
5 in heavens name it is.

6 I am sure Mr. Sorkin can testify about Warner  
7 agreements, but there is a collection in here, including  
8 companies we have never even heard of.

9 CHAIRMAN BRENNAN: Excuse me.

10 Mr. Scheiner, at this point are we discussing any-  
11 thing other than Warner Communications?

12 MR. SCHEINER: At this point nothing else, sir.

13 MR. FERRALL: All right, I will continue, because  
14 almost all of these -- almost every point, except for my  
15 last point, every one of them relates to every provision  
16 in this agreement.

17 There is no indication that these agreements are  
18 typical, or that whether they have been selected by MPAA  
19 for some particular purpose, that, too, goes to the exhibit,  
20 not just to Warner.

21 There is -- perhaps, Mr. Sorkin is in a position  
22 to explain to us why a bunch of blank forms are relevant,  
23 but I would wait to see on that. There are exhibits --  
24 I mention this, in case this comes up later -- two of these  
25 contracts are from companies which I understand are no

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1 longer in existence, or two of these contracts, I take it  
2 back, blank forms.

3 So, to summarize, Mr. Chairman, I think it is  
4 absolutely inexcusable to put in "cut and paste" copies  
5 of selected sections from agreements, and no lawyer would  
6 accept something like that. And I just cannot accept  
7 the relevance of blank forms and not agreements.

8 CHAIRMAN BRENNAN: Commissioner Ray.

9 COMMISSIONER RAY: Mr. Chairman, you made a statement  
10 which is correct, that you cannot read the minds of the  
11 other Commissioners. I will, for the record, indicate my  
12 reasons for not accepting this exhibit. And they were,  
13 for the most part, exactly the same thing that Mr. Ferrall  
14 has recited, with the exception of one or two of the latter  
15 reasons which, in my mind do not necessary apply.

16 But for that reason, that is why I voted against  
17 the exhibit then introduced and if there is no change, I  
18 will do so again.

19 CHAIRMAN BRENNAN: Mr. Scheiner.

20 MR. SCHEINER: Sir, I am prepared to go forward  
21 with Mr. Sorkin, with respect to the extracts from the  
22 standard Warner licensing agreement. And address such  
23 points as were raised in objection to the admissibility  
24 of the document.

25 COMMISSIONER COULTER: May I just ask Mr. Ferrall

1 one question?

2 CHAIRMAN BRENNAN: Of course.

3 COMMISSIONER COULTER: To the extent that these  
4 documents were forms, whose relationship to the real world  
5 was unverifiable, I couldn't agree more with your objections.

6 The one point though that I have a problem with  
7 in your list there was the suggestion that something should  
8 be excluded if the degree to which it was representative  
9 of industry practice couldn't be soundly verified.

10 It strikes me that that has been a deficiency with  
11 a large body of what we have been presented. So, I would  
12 not want to necessarily endorse that point of yours, Mr.  
13 Ferrall.

14 Could you address my observation?

15 MR. FERRALL: Sure.

16 COMMISSIONER RAY: Before you do, Commission, may  
17 I join you in agreement with that, that was one of the  
18 points that I do not accept either.

19 MR. FERRALL: I am not sure, Commissioner Coulter,  
20 that I have your precise point in mind.

21 COMMISSIONER COULTER: I will try again.

22 MR. FERRALL: Would you?

23 MR. SCHEINER: Maybe I can shorten this.

24 MR. FERRALL: Let me deal with it. Go ahead.

25 COMMISSIONER COULTER: You said that the documents

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1 could not be guaranteed as representative of industry.

2 It strikes me that an awful lot of what we have  
3 seen has not been guaranteed as representative of industry  
4 practice. And I would want to establish that as a hard  
5 and fast criterion, but unfortunately, we can't.

6 MR. FERRALL: The point I wanted to make,  
7 Commissioner Coulter, is I think what you say is fair.  
8 The point I wanted to make is that we have no indication  
9 of the basis for selection, and I would concede that that  
10 is something that can be probed on cross.

11 The two things that just overwhelm me in looking  
12 at this exhibit are, one, they didn't even give us the  
13 whole blank form, they gave us selected readings from the  
14 whole blank form. And, secondly, when Ms. Ford, or anyone  
15 has talked about contracts, we have brought you contracts,  
16 we may have crossed out the names, but we have brought you  
17 contracts. These are just blank forms like you would pick  
18 up out of a box.

19 COMMISSIONER COULTER: Okay, but once you have a  
20 witness here that you can grill on, all right, do you do  
21 this, or don't you, isn't the circumstance a little bit  
22 changed?

23 MR. FERRALL: I can't grill him, if he gives me  
24 selected readings. I can't grill him on a "cut and paste".  
25 I don't even know what is in this blank form.

1           Could we just take a look for one second -- the  
2 Warner Brothers Distribution -- let's see if I can find it  
3 here --

4           COMMISSIONER COULTER: You couldn't ask him if it  
5 is "cut and paste"?

6           MR. FERRALL: I know it is "cut and paste", you can  
7 just look at the numbers, it is "cut and paste".

8           MR. SCHEINER: Sir, could I --

9           MR. FERRALL: Well, could I just finish what I am  
10 saying?

11          MR. SCHEINER: Sure.

12          MR. FERRALL: Commissioner Coulter, if I can find  
13 the Warner Brothers which appears in this list to be the  
14 third from the back -- (perusing documents) -- I have a  
15 one-page document which I can barely read, and Warner  
16 Brothers is one of the ones I can read, and there are  
17 obviously attachment pages that go with it that are not  
18 here. They just are not here.

19          On many of the others, you can see the "cut and  
20 pasting", because they give you paragraph one, seven, 14  
21 and so forth. This one is missing, I suspect, sub-  
22 stantial attachments.

23          MR. SCHEINER: Sir, many of these questions will  
24 be answered in the course of the examination of Mr. Sorkin.

25          First, Mr. Sorkin is not offered for the purpose

1 of qualifying anything other than the Warner agreement,  
2 nothing else.

3 Second, to the extent that questions are raised  
4 about extracts only, I have here a copy of the completed,  
5 the full Warner form.

6 And at this juncture, if I may go forward with  
7 Mr. Sorkin, I think we can address such questions, as  
8 hopefully will satisfy the Tribunal on the admissibility  
9 of the Warner Agreement.

10 MR. FERRALL: Mr. Chairman, I must object to  
11 bringing in a completed contract at this time. These are  
12 printed forms, they could have exchanged them at the  
13 beginning.

14 I can't sit here and prepare cross-examination  
15 on this little tiny print, just because Arthur happens to  
16 have brought a copy in.

17 CHAIRMAN BRENNAN: We will take a short recess.

18 (Whereupon, a short recess was taken.)

19 CHAIRMAN BRENNAN: The Tribunal reaffirms its  
20 previous action, the objection, in a general and compre-  
21 hensive sense, is sustained.

22 I believe that concludes Mr. Sorkin's testimony.

23 MR. SCHEINER: Sir, I would respectfully ask the  
24 Tribunal to reconsider the ruling. I brought Mr. Sorkin  
25 in to meet unstated objections by the Tribunal with

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1 respect to admission of a number of contracts. He is  
2 here prepared to testify with respect to the Warner con-  
3 tract only. He is armed with the entire contract from  
4 which these extracts are taken.

5 He is prepared to talk about the dates on which  
6 they were employed, the manner in which they were used,  
7 the consistency of their use and whether there were any  
8 exceptions to the use of the provisions that we are  
9 attempting to introduce in evidence.

10 I think that rejecting the opportunity to make  
11 known with respect to the admissibility of this document  
12 with a qualified witness who is prepared to answer any  
13 and all questions with respect to the document, is  
14 erroneous. And I would respectfully request reconsideration.

15 CHAIRMAN BRENNAN: We have a pending request for  
16 reconsideration. Does any counsel wish to be heard on  
17 the motion for reconsideration?

18 MR. FERRALL: Only if the Tribunal feels that can  
19 be helpful.

20 CHAIRMAN BRENNAN: Do you wish to argue the point,  
21 Mr. Ferrall?

22 MR. FERRALL: Well, I feel Mr. Scheiner has said  
23 what he said before, and I have said what I have to say.

24 CHAIRMAN BRENNAN: We will vote on the motion for  
25 reconsideration.

1 The motion is denied.

2 MR. SCHEINER: The witness is excused then?

3 CHAIRMAN BRENNAN: Yes, thank you, Mr. Sorkin.

4 (Whereupon, the witness was excused.)

5 MR. SCHEINER: May I make an offer of proof?

6 CHAIRMAN BRENNAN: Yes, sir.

7 MR. SCHEINER: If permitted to testify, Mr. Sorkin  
8 would testify that the extract from the Warner Agreement  
9 which appears in MPAA Exhibit P was employed in the  
10 standard Warner Brothers television distribution agreements  
11 for the licensing of series and motion pictures. That it  
12 has been used without exception, qualification, reserva-  
13 tion of any nature from 1975 through the present.

14 CHAIRMAN BRENNAN: Thank you, sir.

15 We will take a temporary recess awaiting the return  
16 of Mr. Cooper.

17 (Off the record.)

18 Whereupon,

19 ALLEN R COOPER

20 having been previously called and sworn, resumed the  
21 stand and testified as follows:

22 REBUTTAL CROSS-EXAMINATION (Resumed)

23 BY MS. FORD:

24 Q The pending question is whether the viewing for  
25 devotional programming was higher or lower for station

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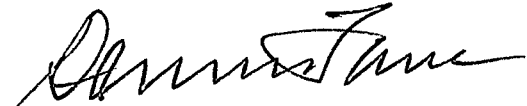
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CERTIFICATE OF SERVICE

I, Dennis Lane, certify that I have, this 29<sup>TH</sup> day of May, 1985, served copies of the foregoing "PROGRAM SUPPLIERS' OBJECTIONS AND MOTION TO STRIKE" by first class mail, postage prepaid, to all parties on the attached list.

  
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